## Policy and Legal Considerations *EPA Guidance to States and Tribes: temperature standards*

Clean Water Act and Endangered
Species Act
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# Environmental policy should utilize an interdisciplinary approach while integrating the use of natural and social sciences in decision making – *how are we doing?*

- The "tool box" of protection measures is expanding at all levels of government: comprehensive approach envisioned by CWA;
- Ongoing trend towards a "partnering" between federal, state, tribal, and private entities in regulatory activities;
- Lawsuits from "all sides" are defining and refining environmental law and agency decision-making;
- Uncertainty in science addressed through more collaborative data collection and interpretation, monitoring and adaptive management;
- Recovery Planning to address native salmonids is integrating habitat, hatcheries, and harvest (the "Hs").



## Policy implications for Water Quality Standards, temperature criteria, and ESA consultation

- The State is addressing aquatic habitat and species protection;
- The federal government using regulatory and planning tools to address aquatic habitat and species protection;
- The planning, preservation, conservation, restoration, and recovery efforts focuses the temperature criteria more towards assessing effectiveness of measures than as a driver for planning. A "part" of the policy for clean water.



## The CWA and temperature criteria as a tool for measuring effectiveness of comprehensive planning – what does the law suggest?

- National criteria for temperature: non-priority pollutant and use of Brungs and Jones (1977)(63 FR 68361);
- States and Tribes have discretion to establish criteria consistent with EPA's CWA § 304(a) or based on other scientifically defensible methods [40 CFR § 131.11(B)(1)];
- States must consider a variety of competing policy concerns during triennial reviews including a waterway's use and value for many uses;
- EPA does not gain substantive power through Section 7 ESA consultation and should not increase its requirements for state water quality standards



#### How might such a policy and legal perspective impact the EPA guidance?

- Guidance should align with National guidance on the issue or clearly describe why it does not;
- Guidance should resist putting additional burdens on state water quality agencies and not require implementation mechanisms;
- Guidance should reflect interpretation of the law and not impose obligations or narrow the discretion otherwise given to agencies under the law;
- Guidance should acknowledge that human activities are already addressing heat input and thermal regimes, but some actions may take time to achieve results.



#### Suggestions from a Policy/Legal perspective

- Guidance should provide broad principles of why temperature is important to native salmonids;
- Guidance should provide alternatives that might be available to help the States and Tribes establish temperature criteria;
- Guidance should describe the current scientific knowledge that can be used by States and Tribes in developing criteria.
- Services should acknowledge many of their own efforts to protect native salmonids as they review State and Tribal WQS that differ from Guidance.